

Recent Trends in Complaints to the State Bar of Nevada: **The Times, They Are a'changin'**

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It probably is no secret that the Office of Bar Counsel gets lots of grievances about Nevada attorneys. The complaints arrive from current clients and former clients – and from relatives of current and former clients. Allegations of ethical misconduct come from opposing lawyers and opposing parties – and from relatives of opposing lawyers and opposing parties.

They come from expert witnesses, medical professionals and court reporters claiming they weren't paid for services. They come from criminal defendants upset with courts and attorneys. They usually vent about defense counsel, but also complain about perceived unfair treatment by prosecutors and judges. They come from people upset with Realtors, engineers or doctors, none of whom are attorneys. They come from people upset with governments in general and politicians in particular. When they include Latin phrases such as “Sui Generis” (“Of his/her own kind” or “In a class by itself”) above their signature instead of “Sincerely,” you can expect some interesting theories.

NEW TRENDS AND NEW GRIEVANTS

CLIENTS

RPC 1.15: “Give me the money!”

The State Bar of Nevada is seeing more complaints from clients who unsuccessfully demanded that their attorneys turn

over personal injury settlements to them. They agree to take responsibility for liens from third parties – usually medical providers or settlement loan companies – and handle bill reductions themselves.

Of course, RPC 1.15 (Safekeeping Property) requires an attorney to protect the interests of any party with an interest in settlement funds. The lawyer, therefore, must resolve all disputes before disbursing funds. If disputes cannot be resolved, Nevada case law requires the attorney to interplead the settlement and let a judge decide how to divide it.

But attorneys still get in trouble by following the client's demands and turning over the money, requiring the third-party lienholders to go after the client. Lawyers who get such demands should contact the state bar's Ethics Hotline for guidance before giving a trust account check to the client when other interested parties have not yet been paid.

RPC 1.16: “My lawyer quit, now I'm stranded.”

Complaints to the state bar about attorneys quitting cases have increased in the last year, with accompanying angst about being able to hire another attorney.

Attorneys terminate representation for multiple reasons. Being fired by the client makes the decision easy, especially because withdrawal when fired is required by RPC 1.16 (Terminating Representation). When lawyers initiate the breakup, it is usually because of unpaid fees, unreasonable demands, the client's volatile personality or all of the above.

RPC 1.16 allows an attorney to ethically withdraw when it can be accomplished with no adverse impact on the client. That means that some deadline or event isn't happening shortly: statute of limitations, discovery, hearings, trial, etc.

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Complaints

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But withdrawal with adverse impact is permitted if the client's actions fall into one of several exceptions. The most common are failure to pay fees, or an insistence on a course of action that the attorney believes is repugnant or with which he or she has a fundamental disagreement.

RPC 1.16: "I fired my lawyer, but he won't quit."

An attorney *shall withdraw* from the representation of a client if he or she is discharged. RPC 1.16(a)(3) (Emphasis added).

The complaint here is usually that the underlying litigation became stalled because the fired attorney won't withdraw, won't return documents and/or won't refund unearned fees. The solution here is simple. When fired, file the motion to withdraw, return whatever is supposed to be returned and leave the client, who is likely a headache, behind.

NON-CLIENTS: OPPOSING PARTIES AND OPPOSING COUNSEL

The growing trend of complaints from non-clients involves two groups: opposing parties and opposing counsel. Opposing parties and/or their lawyers almost universally cite the same ethics rules when they claim the other side's attorney:

1. Filed frivolous pleadings (RPC 3.1 (Meritorious Claims and Contentions));
2. Dragged his or her feet during litigation, which caused legal fees to skyrocket (RPC 3.2 (Expediting Litigation));
3. Allowed his or her client to lie to the court without correcting the falsehoods (RPC 3.3 (Candor to the Tribunal)); and
4. Concealed, destroyed or falsified evidence (RPC 3.4 (Fairness to Opposing Party and Counsel)).

The Office of Bar Counsel routinely reviews court records, if available, when such complaints have underlying litigation. Interestingly, these issues have often already been addressed – and rejected – in court, and the complainant is using the state bar as an alternative judicial forum. Disciplinary boards are not substitutes for the judicial and appellate processes.

NON-CLIENTS: RELATIVES WHO PAY THE RETAINER

Oftentimes clients can't pay the legal fee. This usually occurs in criminal cases – especially with a young person in county jail – and in divorce proceedings that, again, involve a young person.

The financial rescue usually comes from the Bank of Mom & Dad. Sometimes it's the spouse. Whoever it is, the payer always believes their money gives him/her/them a seat at the attorney-client table and access to all facts, legal strategies and decisions. Wrong.

Unless the client gives informed consent, all information relating to the representation is confidential pursuant to RPC 1.6 (Confidentiality of Information). It's best to get that straight with everybody at the beginning. Indeed, the privilege is arguably waived when a third-party (i.e., Mom) is included in – or gets access to – confidential discussions. Limiting information provided to non-clients avoids potential RPC 1.6 issues.

The underwriters also don't get to make decisions regarding representation. Pursuant to RPC 5.4(c) (Professional Independence of a Lawyer), an attorney shall not permit a non-client person who pays the retainer "to direct or regulate" the lawyer's professional judgment.

Bottom Line: strategize with the client and make sure relatives and significant others understand that you can't tell them everything, but you'll be happy to explain – generally – how the system works.

NON-CLIENTS: RELATIVES WHO GET INVOLVED

Some people just can't help themselves. They are a parent, sibling or spouse of a litigant and hear about the case. For some reason they become indignant and, without knowing much about the legal dispute, complain to the state bar about their relative's attorney or opposing counsel. Such grievances have been on the rise recently. Of course, information from the actual parties and attorneys is obtained before such complaints can move forward. But attorneys should remember that their clients aren't the only people who might have a grudge against them.

THE USUAL SUSPECTS

Traditionally, most grievances are filed by clients or former clients, and they often cite the same Rules of Professional Conduct when they claim that the attorney:

1. Didn't know what he or she was doing, got yelled at by the judge and/or was tricked at every turn by opposing counsel (RPC 1.1 (Competence));
2. Refused to file motions that the client demanded and never got permission to grant or stipulate to continuances (RPC 1.2 (Scope of Representation));
3. Failed to do an adequate investigation—which, of course, was the only reason the client lost (RPC 1.3 (Diligence)); and
4. Never returned telephone calls or otherwise communicated and answered questions (RPC 1.4 (Communication)).

RPC 1.1 (Competence)

It is true that attorneys must provide competent representation to a client. However, a loss or terrible court hearing is not per se proof of a competence problem. The client's case could have proof issues, credibility issues or a judge just having a bad day. We've all been there.

Clients believe their cases are winners, but about 50 percent of contested matters lose. That doesn't mean that 50 percent of attorneys are incompetent, especially if they are practicing exclusively in single area, such as family, construction defect, medical malpractice or criminal law. The lawyers probably know what they're doing.

RPC 1.2 (Scope of Representation)

Many clients think of themselves as co-counsel. These clients believe that they must be consulted and permitted to sign off on all legal decisions. Wrong. RPC 1.2 states that in a civil case, the attorney must abide by the client's decision about whether to settle a matter. In a criminal case, clients decide whether to:

- Plead guilty,
- Waive a jury trial, and
- Testify.

That's it.

The attorney makes the tactical decisions. Client approval isn't necessary for continuances. Attorneys also are not required to file frivolous motions demanded by clients (See RPC 3.1 (Meritorious Claims)).

RPC 1.3 (Diligence)

"My attorney didn't do what he was supposed to do" is a common refrain from clients. At 13 words, RPC 1.3 is the shortest Rule of Professional Conduct: "A lawyer shall act with reasonable diligence and promptness in representing a client."

RPC 1.3 is a simple concept: an attorney must do, diligently and promptly, whatever he or she is supposed to do. When something needs to be done, do it. Then do the next thing.

RPC 1.4 (Communication)

Nearly every grievance to the state bar includes a grievance about lack of communication. Sometimes it comes before allegations of stolen money or collusion with opposing counsel. Clients must be reasonably informed about the status of their legal matters. There are, of course, problem clients who call constantly to demand updates. Attorneys don't have to respond to such unreasonable requests, but they do have to ensure that their clients know what's going on. A call or two to the difficult client might prevent a grievance being sent to the state bar. That would lessen the workload, for all of us. **NL**

PHIL PATTEE is the Assistant Bar Counsel who handles Intake for the Office of Bar Counsel. He does the initial processing for virtually every disciplinary grievance received by the State Bar of Nevada.

State Bar Publication: Contract Templates for Nevada Attorneys



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